Beverly Enterprises—Pennsylvania, Inc., d/b/a Grandview Health Care *and* Service Employees International Union, Local 585, AFL–CIO, CLC. Cases 6–CA–26320 and 6–CA–27198

October 15, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND FOX

Pursuant to a charge and amended charge filed in Case 6–CA–26320 on April 7 and April 25, 1994, respectively, and a charge filed in Case 6–CA–27198 on April 11, 1995, the General Counsel of the National Labor Relations Board issued a consolidated amended complaint on May 30, 1995, alleging that the Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing the Union's request to bargain following the Union's certification in Case 6–RC–10978. (Official notice is taken of the ''record'' in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent subsequently filed a second amended answer admitting in part and denying in part the allegations in the consolidated complaint.

On July 10, 1996, the General Counsel filed a Motion for Summary Judgment. On July 12, 1996, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. On July 26, 1996, the Respondent filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

In its second amended answer and response the Respondent admits its refusal to bargain, but attacks the validity of the certification on the basis of the Board's determination in the representation proceeding that Respondent's licensed practical nurses employed as charge nurses are not statutory supervisors.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a California corporation with offices and places of business located throughout the United States, including a facility located in Oil City, Pennsylvania, has been engaged as a health care institution in the operation of a nursing home providing inpatient medical and professional care and services for the elderly, sick, and infirm. During the 12-month period ending March 31, 1994, the Respondent, in conducting its business operations described above, derived gross revenues in excess of $100,000 and purchased and received at its Oil City, Pennsylvania facility goods valued in excess of $5000 directly from points outside the Commonwealth of Pennsylvania. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and a health care institution within the meaning of Section 2(14) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Certification*

Following the election held January 27, 1994, the Union was certified on March 11, 1994,[1] as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

[1] On August 24, 1994, subsequent to the certification, the Board issued an order granting the Respondent's request for reconsideration of the Board's previous denial of the Respondent's request for review of the Acting Regional Director's Decision and Direction of Election and remanding to the Regional Director for reconsideration in light of the Supreme Court's decision in *NLRB v. Health Care & Retirement Corp.*, 511 U.S. 571 (1994). The Regional Director thereafter issued a supplemental decision affirming the Acting Regional Director's prior finding that the Respondent's charge nurses are not supervisors, and by order dated May 17, 1996, the Board denied the Respondent's request for review.

Chairman Gould, who was not on the panel in the underlying representation case, and Member Fox agree that review of the Regional Director's Supplemental Decision and Order was correctly denied. They also agree that, in view of the fact that, in response to the Employer's motion for reconsideration at an earlier stage of the proceeding, the case was remanded for further consideration by the Regional Director in light of the Supreme Court's intervening decision in *NLRB v. Health Care & Retirement Corp.*, and that the remand expressly contemplated a possible reopening of the record, there was no error in the Regional Director's reliance on evidence introduced in the 1994 reopened hearing concerning the functioning of the Employer's nursing facility after the close of the initial hearing in 1993.

> All full-time and regular part-time licensed practical nurses employed by the Employer at its Oil City, Pennsylvania, facility; excluding the medical records coordinator, registered nurses, service and maintenance employees, office clerical employees, management employees, casual and temporary employees and guards, professional employees and supervisors as defined in the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. *Refusal to Bargain*

About March 16, 1994, and February 6, 1995, the Union requested the Respondent to bargain, and, since April 4, 1994, the Respondent has refused. We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By refusing to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by the law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, Beverly Enterprises—Pennsylvania, Inc. d/b/a Grandview Health Care Center, Oil City, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Service Employees International Union, Local 585, AFL–CIO, CLC as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment, and if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time licensed practical nurses employed by the Employer at its Oil City, Pennsylvania, facility; excluding the medical records coordinator, registered nurses, service and maintenance employees, office clerical employees, management employees, casual and temporary employees and guards, professional employees and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facility in Oil City, Pennsylvania, copies of the attached notice marked ''Appendix.''[2] Copies of the notice, on forms provided by the Regional Director for Region 6 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 7, 1994.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region

[2] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. October 15, 1996

William B. Gould IV, Chairman

Margaret A. Browning, Member

Sarah M. Fox, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with Service Employees International Union, Local 585, AFL–CIO, CLC as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

> All full-time and regular part-time licensed practical nurses employed by us at our Oil City, Pennsylvania, facility; excluding the medical records coordinator, registered nurses, service and maintenance employees, office clerical employees, management employees, casual and temporary employees and guards, professional employees and supervisors as defined in the Act.

BEVERLY ENTERPRISES—PENNSYLVANIA, INC. D/B/A GRANDVIEW HEALTH CARE CENTER